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No.

In The

Supreme Court of the United States

OCTOBER TERM 1986

JUANA DABISH, Executrix of the
Estate of SAM DABISH, JR.,
A Minor
Petitioner

vs.

CHARTER ARMS CORPORATION,
A Foreign Corporation,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

THE SIXTH CIRCUIT'S DECISION TO PROCEED TO THE MERITS OF THE PETITIONERS' REQUEST FOR A NEW TRIAL BASED ON POSSIBLE JUROR MISCONDUCT RATHER THAN REMAND THE CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

II

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT AN AGENT'S NEGLIGENCE IS IMPUTABLE TO THE CORPORATION CONFLICT WITH ESTABLISHED PRINCIPLES OF STATE LAW

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Juana Dabish, Executrix of the Estate of Sam Dabish, Jr., a Minor and Respondent Charter Arms Corporation, a foreign Corporation.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

JUANA DABISH, Executrix of the
Estate of SAM DABISH, JR.,
A Minor
Petitioner

VS.

CHARTER ARMS CORPORATION,
A Foreign Corporation,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Juana Dabish, Executrix of the Estate of Sam Dabish, Jr., a minor, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceeding on June 20, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the Appendix hereto, (*infra* p. 1a)

The memorandum opinion and order of the United States District Court Eastern District of Michigan, Southern Division (Woods, D.J.) has not been reported. It is reprinted in the appendix hereto, (*infra* p. 16a)

JURISDICTION

Invoking diversity jurisdiction under 28 U.S.C. Section 1332, the Petitioner brought this suit in the Eastern District of Michigan, Southern Division. On July 30, 1984, the

Southern Division denied the Petitioner's Motion for Judgment Notwithstanding the Verdict or, Alternatively, For New Trial.

On Petitioner's appeal, the Sixth Circuit on April 30, 1986, rendered a judgment affirming the Eastern District Of Michigan, Southern Division.

Petitioner's Petition for Rehearing was denied June 20, 1986 and the Opinion issued as mandate June 30, 1986.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF CASE

On December 8, 1976, Plaintiff/Petitioner Sam Dabish, Jr., was a nine-year old boy who, while dressing for school, was accidentally shot in the neck by a 10-year old playmate who mistook a 5 shot, .38 caliber handgun for a toy. As a result of the accident, Sam Dabish, Jr., was rendered a quadraplegic. The gun had no safety features.

Dabish filed suit against the Respondent, Charter Arms, alleging a failure to incorporate in its product any safety systems which would prevent the discharge of the pistol by someone who was unfamiliar with its purpose and operation.

During the course of the trial, Mr. David N. Ecker, President of Charter Arms, Inc., testified about his knowledge that the revolver would be used for personal protection and carried to and from an owner/user's home. Ecker also acknowledged that it was foreseeable that such a gun could be left in plain view and mistaken for a toy. He further acknowledged that no measures were taken to explore or integrate safety features which would prevent the gun's firing when such mistakes occurred.

At the conclusion of the trial, Petitioners requested that the jury receive a specific instruction indicating that a corporation was liable for the acts of negligence of its agents, officers, employees, etc. Petitioner believed that the jury could not impute the negligence of Charter Arm's president, Mr. Ecker, to the corporation without receiving some positive instruction on the law. The Court denied Plaintiff's request to give such an instruction and advised Plaintiff that he could argue the issue to the jury.

At the close of the jury's deliberations, the bailiff received a note from the foreperson announcing that the jury had reached a verdict. Prior to the parties arrival at the courthouse the bailiff received a second note from the foreperson which said: "May I see you?" (*Infra* Opinion p. 6a.)

Without the knowledge or approval of the court or the parties, the bailiff spoke to the foreperson and was advised that at the conclusion of the deliberations, a juror informed the foreperson that this juror's husband had a pending personal injury lawsuit which was to commence the following month; the juror had failed to mention this during the course of voir dire.

When the parties arrived at the courthouse, the court advised them of what had transpired and called the bailiff to state what she learned on the record. (*Infra* Judgment p. 7a.) At no time did the court seek to learn the identity of this juror or speak to her nor did it speak with the jury foreperson to determine what effect it may have had on the deliberations.

When the court asked counsel what should be done, counsel for both parties acknowledged that the situation was unique to them. Each questioned why it arose at the time that it did and both wanted to know whether it figured in the lawsuit or the deliberations in any way.

The court directed counsel for Plaintiff to discuss the matter with his clients. Learning about the occurrence and before the verdict was rendered, Plaintiff's counsel asked for a mistrial on the basis that he may have conducted his voir dire in a different manner. The motion was denied. Counsel for Respondent, Charter Arms, requested an opportunity to inquire of the juror about the matter and the court stated that it saw no reason to do so. The jury returned its verdict for Charter Arms. (*Infra.*, Judgment p. 7a.)

Petitioner made a motion for judgment notwithstanding the verdict or, alternatively, for new trial. The motion was denied. The District Court denied that there was error in failing to instruct on a corporation's negligence because it saw such an instruction as being appropriate only when an issue was raised with respect to the liability of the corporation versus its agents or employees. (*Infra*, Memorandum p. 15a-16a.)

The District Court also ruled there was no error in denying the Plaintiff's Motion for Mistrial. The Court in its opinion stated:

> "The Court, in the exercise of its discretion does not believe that the above incident in any way denied plaintiff a fair trial. In the absence of exceptional circumstances, a new trial is generally not warranted by the inadvertent failure of a juror to disclose other actions or claims unless the losing party establishes prejudice in the sense that the juror was improperly influenced by the undisclosed action. This is particularly true when the failure to disclose was inadvertent. (Citations omitted.) Plaintiff has at no time alleged exceptional circumstances or improper influence." (*Infra*, Memorandum pp. 19a.)

Petitioners appeal the District Court's decision to the Sixth Circuit. The Sixth Circuit, relying on *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 US 548, (1984) upheld the district court's decision to deny Petitioners' Motion for A New Trial.

Citing Justice Rehnquist's two part test in *McDonough*, the Sixth Circuit stated:

> "Plaintiff Dabish failed to pass the first part of this test. There has been no showing here that 'a juror failed to answer honestly a material question . . .' Plaintiff Dabish's real complaint is that the prospective juror failed to volunteer an answer to a question that was never asked. This is not a basis for declaring a mistrial." (*Infra*, Judgment p. 9a.)

The Sixth Circuit also stated that the District Court did not err in refusing to instruct the jury that the negligence of a corporation's officers is the negligence of the corporation. The court found Petitioner's reliance on *Posttape Associates* v. *Eastman Kodak Co.*, 537 F2d 751 (3rd Cir. 1976) misplaced because unlike the facts in *Posttape* there was no such "interweaving" between different forms of business

organization, and we are aware of no complexity that would have required the jury to receive elucidation it failed to get. (*Infra*, Judgment p. 10a.)

On rehearing, the Sixth Circuit refused to accept the Petitioner's contention that the Michigan Supreme Court's decision in *Moody* v. *Pulte Homes, Inc.*, 423 Mich 150, 378 NW2d 319 (1985) required reversal of its decision. The Sixth Circuit read the decision as one in which the trial court's failure to adequately read the Plaintiff's theory of the case coupled with the serious deficiencies in the substantive charge to the jury required reversal:

> "The instructions on vicarious liability requested by the plaintiff in *Moody* had a 'special significance'. The Supreme Court said, because the senior Cinader 'was not present at the construction site at the time of the accident and had no direct involvement in the activities which ultimately resulted in the plaintiff's injury' ".
>
> "In the case at bar, by way of contrast, Plaintiff Dabish expressly waived any requirement that the court give the jury the Plaintiff's particular theories of the lawsuit. [Citations omitted.] There was no risk, in the case at bar, that the jury might fail to impute any negligence of the Defendant's president to the corporation because the president was present at the accident and the corporation was not and we see no likelihood, in the case at bar, that the jury might not conclude that the president had been negligence but the corporation itself had not been." (*Infra*, Order p. 2a-3a.)

The Sixth Circuit denied the Petition for Rehearing on June 20, 1986.

REASONS FOR GRANTING THE WRIT

I

THE SIXTH CIRCUIT'S DECISION TO PROCEED TO THE MERITS OF THE PETITIONERS' REQUEST FOR A NEW TRIAL BASED ON POSSIBLE JUROR MISCONDUCT RATHER THAN REMAND THE CASE TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Sixth Circuit in proceeding to the merits of the Petitioners' claim for a new trial based upon juror misconduct used the approach to review such claims which this Court criticized in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 US 548, 104 S.Ct 845, 78 L.Ed 2d 663 (1984):

> "Although neither party challenges the propriety of the Court of Appeals having disposed the question on the merits, we believe that the proper resolution of the legal issue should be made by the District Court. See *infra*, p. 850. Nevertheless, we address the issue in order to correct the legal standard the District Court should apply upon remand."
>
> * * *
>
> "While consideration of judicial economy might have motivated the Court of Appeals in this case to proceed directly to the issue of the effect of juror Payton's nondisclosure, in cases in which a party is asserting a ground for new trial, the normal procedure is to remand such issues to the district court for resolution. Although petitioner does not dispute respondents' version of the telephone call to juror Payton, it is foreseeable that in another such case, the parties could present the appellate court with a continuing, difficult factual dispute. Appellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies." *Id.*, n.3 at 848

In *McDonough, supra,* this court criticized the 10th Circuit Court of Appeals for proceeding to the merits of the

respondent's claim that a juror's silence prejudiced the parties' right to exercise a peremptory challenge rather than remanding the case back to the district court for an evidentiary hearing.

In the instant case, the Sixth Circuit merely reviewed the voir dire questions and determined that the specific question that the unknown juror had failed to answer was never asked. A review of the voir dire questions without knowing the juror's reason for not discussing her interest in a pending lawsuit could not provide the district or appellate court with the reason why the juror, after deliberations were concluded, specifically mentioned her husband's pending lawsuit in which she could have been a party. This act was contrary to the judge's instructions in which the jurors were instructed to speak to no one. This act occurred at the conclusion of jury deliberations. The unique circumstances presented in this case where neither the parties nor the court were in a position to determine the basis for the juror's concern required more than speculation by the trial judge as to what the juror's motives in mentioning this lawsuit were and whether it had any effect on her's or the jury's deliberations. The district court's failure to explore the matter at that point or upon subsequent motion for new trial based in part on juror misconduct was an abuse of discretion.

The Sixth Circuit could not possibly determine the jurors' motives without knowing her identity or learning which questions she answered and why. A review of the voir dire without more could not provide the answers to these questions. The case should have been sent to the District Court to develop a record before the determination based on *McDonough*, 464 US 548, (1984) was addressed.

Although the Circuits have been inconsistent in their application of *McDonough*, 464 US 548, (1984) most courts have had the benefit of the results of an evidentiary hearing, held in response to a claim of juror misconduct. See *U.S.* v. *Perkins*, 748 F2d 1519 (11th Cir. 1984), *Federal Crop Insur-*

ance Corporation v. *Hester*, F65 F2d 723 (8th Cir. 1985). This court must provide guidance on the proper procedure to be used on review when juror misconduct is claimed.

In *U.S.* v. *McMahon*, 744 F2d 647 (8th Cir. 1984) the petitioners' claim that he was denied a peremptory challenge when a juror misstated his residence resulted in the granting of an evidentiary hearing. The 8th Circuit, though affirming the district court's decision to deny a new trial, acknowledged that the trial court was in the best position to evaluate the relevance of undisclosed evidence and later discovered facts.

There was no hearing in *United States* v. *Kerr*, 778 F2d 690 (11th Cir. 1985) where the court affirmed the district court's denial of an evidentiary hearing. In *Kerr, supra*, the juror failed to offer that she was married to a former law enforcement officer. The specific question on voir dire asked about relationships to those presently involved in law enforcement.

As in the instant case, the court in *Kerr, supra*, inferred the juror's motivations in not responding to the general question rather than discovering them through the juror's testimony at an evidentiary hearing.

The Sixth Circuit's decision in the instant case is also inconsistent with its own views it expressed in *U.S.* v. *Howard*, 752 F2d 220 (6th Cir. 1985) *cert denied* ___ US ___ 105 S.Ct 3502 (1985).

In that case, an alternate juror who later sat as a member of the jury failed to answer a question regarding her relationships with law enforcement officers. The court, applying the deliberate concealment standard set forth in *McCoy* v. *Goldston*, 652 F2d 654 (6th Cir. 1984) found that a post trial evidentiary hearing was required to determine if a new trial was necessary.

On the basis of the juror's responses at this hearing, the court affirmed the district court's finding that an honest mis-

take made in response to the question did not warrant a new trial. In *Howard, supra*, as in *McCoy, supra*, the Sixth Circuit recognized the necessity for a post-trial hearing to determine if allegations of bias were founded.

The conflicting approaches taken by the various circuits including a conflict within the Sixth Circuit itself indicates a substantial and immediate need to review the manner and method in which *McDonough* is being applied and to provide the necessary guidelines to avoid the possibility of a tainted trial.

Finally, the Sixth Circuit failed to take into account the possible impropriety which developed when the bailiff and foreperson had a conversation about the unidentified juror's disclosure. (Annot. 32 ALR Fed. 392).

II

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT AN AGENT'S NEGLIGENCE IS IMPUTABLE TO THE CORPORATION CONFLICTS WITH ESTABLISHED PRINCIPLES OF STATE LAW

This Court recognized over 100 years ago that a corporation is liable for the acts of its agents. The court in *Baltimore & Potomac Railroad Company* v. *First Baptist Church*, 108 US 317, 330, 2 S.CT 719, 27 L.Ed 739 (1882) stated:

> "The liability of the defendant for the annoyance and discomfort caused is the same also as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted that an action will not lie against a corporation for a tort, is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support."

The district court believed that this legal principle need not be discussed because there was no dispute that the corporation, through its president, manufactured and marketed the revolver at issue. The refusal to instruct under these circumstances directly conflicts with established Michigan Law which states:

> "It is an old established rule of law that where the facts are unquestioned from which a rule of law is to be deduced, the judge cannot leave it to the jury to deduce the rule, but must do it himself, and give them positive instructions upon the facts. *Stearns* v. *Vincent*, 50 Mich 209 (45 Am Rep 37). Where the testimony as to a fact is not disputed, the jury should be instructed to find it accordingly. *Dondera* v. *Frumveller*, 61 Mich 440." Cited in *Holbert* v. *Staniak*, 359 Mich 283, 290, 102 NW2d 186 (1960).

In the instant action, the Sixth Circuit agreed with the District Court that an instruction which would affirmatively state that an agent's negligence is imputable to the corporation was unnecessary because there was no risk the jury would fail to do so. (*Infra*, Judgment p. 10a, Order p. 3a)

The Sixth Circuit concluded that the Michigan Supreme Court's holding in *Moody* v. *Pulte Homes, Inc.*, 423 Mich 150, 378 NW2d 319 (1985) did not require reversal of the district court's actions because there were special circumstances in *Moody* not present in the instant case. Specifically, in the instant case, the Petitioner waived his right to read his theory of the case and unlike *Moody* where the corporate president was not at the accident site, the president of Charter Arms Corporation was at the manufacturing site.

Petitioner submits that the Michigan Supreme Court's directives in *Moody, supra*, are not to be construed so narrowly. By inviting the petitioner to argue his theory of imputed negligence and then not instructing the jury on the issue, the court removed the credibility of Petitioner's argument.

In *Moody, supra*, the court failed to make any statement, by instructions or theory, which would call attention to the principle of vicarious liability.

In the instant case too, the trial court failed to make any statement through jury instructions on the Petitioner's claim of vicarious liability. Allowing the Petitioner to argue the issue to the jury was insufficient guidance to the jury.

Petitioner asks this court to review the decisions of the trial court and the Sixth Circuit Court of Appeals in light of *Moody, supra*, at 185 and consider the following statement contained therein:

> "While lawyers and judges may have had no trouble interpreting the evidence and the court's instructions as implicitly recognizing the possible vicarious liability of

Cinader as an employer, jurors untrained in the law of torts and agency cannot be expected to have inferred it."

The rulings of the lower court were against the laws of the state of Michigan. Petitioner prays that this court direct the lower court to follow the rule of *Moody* v. *Pulte Homes*, 423 Mich 150, 378 NW2d 319 (1985).

CONCLUSION

This case has been placed in a posture of prejudice. It is apparent from the record that a juror was troubled by the fact that a family member was soon to be involved in litigtion and wished to disclose that fact to the court. The communication by the juror with court personnel was in and of itself improper. However, the failure of the trial court to investigate the basis of the juror's concern or to grant a mistrial is of even greater concern.

The very concerns that are present in this case were expressed and discussed *McDonough Power Equipment, Inc. v. Greenwood*, 464 US 548, 104 S.Ct 845, 78 L.Ed 2d 663 (1984). There can be no way to determine the effect the juror's husband's pending lawsuit had on the deliberations or what effect it had on the juror's own perceptions and bias. Time, money and expediency cannot be the sole determinants of a fair trial.

If the jury process was tainted it should be corrected at whatever the cost or the system should be abandoned.

The importance of the jury process is stressed in *McDonough, supra*, but that decision is not being followed by the lower courts. The erosion of this court's mandate is becoming more frequent and should be stopped in order to insure that there is indeed a fair trial.

In addition, the District Court erred and misinterpreted state law by failing to provide the jury with an instruction that the negligence of a corporate officer was the negligence of the corporation.

Even though this court over 100 years ago recognized the principle of vicarious liability for corporations, the Michigan Supreme Court just one year ago emphasized that a jury could not be expected to infer the principles of tort and agency law on this very point.

By having the president of the corporation testify it was likely that the jury could infer that the president, by virtue

of his office was personally responsible rather than the corporation being responsible for his acts. The only way to prevent this inference and insure the proper consideration of corporate liability would be by having the court provide the jury with an instruction on the principle of vicarious liability. A district court's sanctions of argument on a legal principle without more could not ensure the jury's understanding of legal principles which to practitioners and courts seem obvious.

This court must advise the lower court that such expectations of juries are unreasonable and unfair to the presentation of a party's case.

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vs.

CHARTER ARMS CORPORATION,
A Foreign Corporation,
Respondent,

APPENDIX

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Court of Appeals Order
(Filed June 20, 1986)

COURT OF APPEALS ORDER
(Filed June 20, 1986)

No. 84-1585
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUANA DABISH, Executrix of the
Estate of SAM DABISH, JR., a minor,

Plaintiff-Appellant,

v. ORDER

CHARTER ARMS CORPORATION,

Defendant-Appellee.

Filed , 1986

BEFORE: JONES and NELSON, Circuit Judges, and PECK, Senior Circuit Judge.

Plaintiff-appellant Dabish has petitioned the court for rehearing of its April 30, 1986, decision affirming the judgment entered by the trial court on a verdict in favor of Defendant Charter Arms. Plaintiff Dabish argues that under *Moody v. Pulte Homes, Inc.*, 423 Mich. 150, 378 N.W.2d 319 (1985) (an opinion written by Justice Ryan prior to his appointment to this court), it was reversible error for the trial court to withhold an instruction requested by Plaintiff Dabish on the vicarious liability of corporations for damages caused by negligence of their officers and employees.

We do not read *Moody* as requiring reversal of the judgment entered here.

The plaintiff in *Moody*, who had been hired by defendant Clyde Cinader to haul dirt at a construction project, was injured while helping a fellow employee, defendant Cinader's son Scott, start a bulldozer. The complaint alleged that defendant Clyde Cinader knew his son was incompetent and was directly negligent both in permitting such an individual to operate heavy equipment and in failing adequately to

supervise him. The complaint also alleged that defendant Clyde Cinader was vicariously liable for his son's negligence under the *respondeat superior* principle.

The trial court in *Moody* failed adequately to apprise the jury of the plaintiff's theory of the case, as required by Michigan law, and "the shortcomings in the court's statement of the plaintiff's theory of the case", in Justice Ryan's words, taken together with serious deficiences in the substantive charge to the jury, "so unfairly prejudiced [the plaintiff] in a materially substantial way" as to require reversal. 378 N.W.2d at 328.

> "Nothing in the court's abbreviated statement of the plaintiffs' theories of liability against Cinader suggested that it was plaintiff's claim that Cinader was liable because of his failure to supervise the work of his employee-son, or because he placed a dangerous bulldozer on a job site, or because the law imposes vicarious liability upon an employer for the negligent acts of his employee committed within the course of employment. Moreover, nothing in the trial court's substantive instructions to the jury concerning the law applicable to this case suggested, even remotely, that the asserted negligence of Scott Cinader was attributable to his father-employer Clyde Cinader, or that recovery could be had against Clyde Cinader for his primary negligence in failing to supervise the job or for negligently placing a dangerous instrumentality on the job site." 378 N.W. 2d at 335-36.

The instructions on vicarious liability requested by the plaintiff in *Moody* had a "special significance," the Supreme Court said, because the senior Cinader "was not present at the construction site at the time of the accident and had no direct involvement in the activities which ultimately resulted in the plaintiff's injury." 378 N.W. 2d at 335.

In the case at bar, by way of contrast, Plaintiff Dabish expressly waived any requirement that the court give the jury the plaintiff's particular theories of the lawsuit. (Joint Appendix, pp. 1002-23.) There was no risk, in the case at bar, that the jury might fail to impute any negligence of the defendant's president to the corporation because the president was present at the accident and the corporation was not. And we see no likelihood, in the case at bar, that the jury might conclude that the president had been negligent but the corporation itself had not been.

The jury was told, in the case at bar, that:

> "The Defendant had a duty to use reasonable care in designing and/or manufacturing the revolver so as to eliminate all risks of harm or injury which were unreasonable and foreseeable.
>
> "A failure to fulfill that duty is negligence." (Joint Appendix, p. 1130.)

Under the facts of the case at bar, and in light of the charge that was given, the trial court considered it "self-evident" that Charter Arms Corporation would be liable for any negligence of its officers or employees in designing or manufacturing the revolver with which Sam Dabish, Jr. was shot. We agree, and we see nothing to the contrary in *Moody v. Pulte Homes*.

It is, therefore, ordered that the petition for rehearing be DENIED.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk of Court

Court of Appeals Judgment
(Filed April 30, 1986)

COURT OF APPEALS JUDGMENT
(Filed April 30, 1986)

No. 84-1585
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUANA DABISH, Executrix of the Estate of SAM DABISH, JR., a minor,
Plaintiff-Appellant,

v.

CHARTER ARMS CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Decided and Filed 1986

BEFORE: JONES and NELSON, Circuit Judges, and PECK, Senior Circuit Judge.

PER CURIAM. This case arises out of a tragic accident that occurred after a friend of the plaintiff's family left a loaded revolver on the kitchen table. A ten year old child picked up the revolver, believing it to be a toy, pointed it at young Sam Dabash, and pulled the trigger. The bullet severed Sam's spinal cord, rendering him a quadriplegic.

Sam's mother brought an action on his behalf against defendant Charter Arms Corporation, the manufacturer of the revolver. The case was tried to a jury, which returned a verdict in favor of Charter Arms. We shall affirm the judgment entered on that verdict.

I

Plaintiff Dabish's principal contentions on appeal are that there was "possible juror misconduct" and that the trial court abused its discretion by failing to hold an evidentiary hearing regarding such possible misconduct and by denying plaintiff's motion for a new trial or for relief from judgment.

Court of Appeals Judgment
(Filed April 30, 1986)

During the voir dire examination of prospective jurors Mr. Meklin, the lawyer representing plaintiff Dabish, asked the panel these questions and received these answers:

"Has any member of the jury or member of your immediate family ever been involved in accident investigation, accident reconstruction or claims work?

Nobody has been involved in any claims work on the jury?

JUROR NUMBER 3: Do you mean for like car accidents?

MR. MEKLIR: Yes, they work in the capacity where somebody has a claim for injury or property loss.

JUROR NUMBER 3: My husband had a lawsuit for a car accident. Is that what you meant?

MR. MEKLIR: No. My question was: Has anybody ever worked where they would have to evaluate claims either for injury or property damage?

JUROR NUMBER 3: No.

MR. MEKLIR: Has anybody on the jury ever been involved in any kind of accident where they were injured?

JUROR NUMBER 7: Car accident.

MR. MEKLIR: When did that occur?

JUROR NUMBER 7: A few summers ago.

MR. MEKLIR: What type of injury did you have?

JUROR NUMBER 7: There was just minor injuries.

MR. MEKLIR: Was there any lawsuit brought?

JUROR NUMBER 7: No.

JUROR NUMBER 1: I just received an out-of-court settlement because I was bit by a junkyard dog.

MR. ARNONE: You have another hand.

JUROR NUMBER 9: Any type of accident where you were injured?

MR. MEKLIR: Yes.

JUROR NUMBER 9: About thirty-five years ago, I was shot with a pellet gun, was hit in the eye.

MR. MEKLIR: What kind of injuries did you sustain?

JUROR NUMBER 9: Lost the eye.

MR. MEKLIR: You have only vision in one eye, then?

JUROR NUMBER 9: Yes.

MR. MEKLIR: That is a serious loss. Would you in any way be affected in terms of feeling sympathy for my client who, by the way, has suffered a tremendous injury, because, just because of your past experience, without regard to the other evidence that may be brought out?

JUROR NUMBER 9: I would be objective."

Later in the voir dire the lawyer for defendant Charter Arms asked the panel "[h]as any member of the jury or prospective juror every had a lawsuit filed against them (sic)?" There was no response to this question.

At the end of the trial, after the jury had retired and conducted its deliberations, the bailiff received a note from the foreman saying that the jury had reached a verdict. The lawyers were summoned by telephone, and while their return was being awaited the bailiff received a second note from the foreman. It said "May I see you?"

Court of Appeals Judgment
(Filed April 30, 1986)

Without the knowledge of the court, the parties, or the other jurors, the bailiff spoke to the foreman and was told that she had just learned that the husband of one the of jurors had a lawsuit that was to come up for trial soon. The jury panel had not been asked any questions on voir dire about spousal litigation, as opposed to "accident investigation, accident reconstruction or claims work," and the juror concerned had seen no reason to mention her husband's lawsuit earlier. That judgment does not seem unreasonable, particularly in view of counsel's express statement to the jury that he was not inquiring about Juror Number Three's husband's car accident lawsuit.

The bailiff reported her conversation to the trial court, who asked the bailiff to tell counsel for the parties what the foreman had said. The bailiff then advised counsel that "Mrs. Brooks (the foreman) indicated that after the jury deliberations were over with and after they had filed all the information necessary, one of the other jurors mentioned that her husband has a pending case that was coming up July 9. She said she didn't state what court, what type of case. I have no idea what exactly it involved and neither does she and that is it."

The court then asked counsel if they saw "any reason to get excited about this," or had "any suggestions as to what to do . . . ." The plaintiff's lawyer responded "I don't know. I wish we had a couple of alternatives. Use your crystal ball."

The court subsequently invited the plaintiff's lawyer to step outside to talk to his client, which the lawyer did. He returned five minutes later and said "I am tempted to ask for a mistrial." The court asked "[o]n what basis?" The lawyer responded "[o]n the basis that had we had that information, we may have conducted our voir dire in another manner." The court suggested, in response, that there was no indication that the juror's husband's lawsuit had any

effect on the jury's deliberations. Plaintiff Dabish's lawyer then moved for a mistrial, and the court denied the motion. Counsel for defendant Charter Arms said he had been going to ask the court to inquire of the juror, and the court responded "[n]o. I see no reason to do that. There is nothing that has been indicated to the court on the recitation made that the court feels would dictate the necessity of any inquiry."

The jury then returned its verdict for defendant Charter Arms. The trial court denied a subsequent motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. In response to the plaintiff's contention that the court had erred in refusing to grant the motion for a mistrial, the court wrote that it did not believe the incident involving the juror's husband's lawsuit denied plaintiff a fair trial:

> "In the absence of exceptional circumstances, a new trial is generally not warranted by the inadvertent failure of a juror to disclose other actions or claims unless the losing party establishes prejudice in the sense that the juror was improperly influenced by the undisclosed action. This is particularly true when the failure to disclose was inadvertent. [Citations omitted.] Plaintiff has at no time alleged exceptional circumstances or improper influence."

II

We do not believe that the trial court abused its discretion in refusing to order a new trial. This case is governed, we believe, by *McDonough Power Equipment Inc. v. Greenwood*, ___ U.S. ___, 104 S.Ct. 845 (1984), a "products liability" case anlagous to this one. *McDonough* involved the failure of a juror to respond affirmatively to a question on voir dire seeking to elicit information about previous injuries

to members of the juror's immediate family. The United States Supreme Court, speaking through Justice Rehnquist, expressed itself as follows:

> "We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." ___ U.S. at ___, 104 S.Ct. at 850.

Plaintiff Dabish failed to pass the first part of this test. There has been no showing here that "a juror failed to answer honestly a material question . . . ." Plaintiff Dabish's real complaint is that the prospective juror failed to volunteer an answer to a question that was never asked. This is not a basis for declaring a mistrial.

III

Plaintiff Dabish's other claims of error are equally without merit.

First, the trial court is claimed to have abused its discretion in failing to let the jury see a movie on "a day in the life of" the injured child. The trial court reviewed the film, but decided that it was cumulative to testimony already given, was unfairly prejudicial, and constituted inadmissible hearsay. This court has not reviewed the film, but the film would obviously have constituted hearsay. Any error in refusing to allow the jury to see the film, whether inadmissible hearsay or not, was necessarily harmless: the film did not relate to the issue of liability, and that was the only issue the jury reached.

Second, plaintiff Dabish says that the trial court abused its discretion in denying a request to instruct the jury that the negligence of a corporation's officers is the negligence of

the corporation. In this connection plaintiff relies on *Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751 (3rd Cir. 1976). In that case the knowledge of an individual who was a 50% owner of a corporation that was a general partner was imputable to the partnership, but the trial court refused so to instruct the jury. The Court of Appeals for the Third Circuit held that this was reversible error: "the jury should have been instructed that Spinelli's knowledge was attributable to Posttape Associates in the same manner as a partner." 537 F.2d at 757. The court evidently did not think that the significance of the "the interweaving between the partnership and the corporation" would be self-evident to the jury. Here we have no such "interweaving" between different forms of business organization, and we are aware of no complexity that would have required the jury to receive elucidation it failed to get.

Plaintiff Dabish also complains of a miscellany of other evidentiary rulings. We have examined each of these claims carefully, and we find no merit in any of them.

The judgment of the trial court is AFFIRMED.

DISTRICT COURT MEMORANDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUANA DABISH, Executrix of
the Estate of SAM DABISH, JR.
a Minor,

Plaintiff,

vs. CIVIL ACTION NO. 82-71682

CHARTER ARMS CORPORATION,
a foreign corporation

Defendant.

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 30th day of July, 1984.

PRESENT: The Honorable George E. Woods
United States District Judge

This matter is before the Court on plaintiff's motion for judgment notwithstanding the verdict or, alternatively, for new trial. For the reasons stated below, the motion is DENIED.

I.

In 1980, Jesus Moreno shared a home with Sam and Juana Dabish and their children. On the evening of December 7, 1980, he returned to the home carrying a five-shot .38 caliber revolver manufactured by defendant Charter Arms Corporation (Charter Arms). Mr. Moreno did not have a permit for the revolver; it was owned by his employer, Frank Kuraikuz. Mr. Moreno placed the weapon on the kitchen table and retired. He did not unload the revolver or take any other steps to make it inoperable.

On the morning of December 8, 1980, Gordon Osborne, age 10, arrived at the Dabish home for the purpose of

obtaining a ride to school with Sam Dabish, Jr. Osborne observed the revolver and, believing it to be a toy, picked it up and pulled the trigger. The bullet from the loaded weapon struck Sam Dabish, Jr., in the neck and severed his spinal cord, rendering him a quadriplegic.

On May 10, 1982, a products liability action was filed by Juana Dabish, executrix of the estate of Sam Dabish, Jr., against Charter Arms. The complaint alleged counts in negligence and breach of warranty.

A jury trial was commenced on June 18, 1984. The thrust of plaintiff's case as presented at trial was that, despite defendant's awareness that revolvers could fall into the hands of children, it failed to incorporate an external manual safety device on its product. Defendant countered that the revolver actually incorporated four safety devices: a positive barrier in front of the hammer, a trigger guard, a trigger pull and a cylinder which would not open or close when the hammer was cocked. Further, defendant responded that the external manual safety device proposed by plaintiff would render the weapon unfit for its intended use: the personal protection of adult consumers and law enforcement personnel. On June 28, 1984, the jury rendered a verdict for the defendant.

The Sixth Circuit recently reiterated the standard governing a motion for judgment notwithstanding the verdict:

> A judgment notwithstanding the verdict has long been recognized as the legal equivalent of a directed verdict and both are governed by the same standards. *See Warkentien* v. *Vondracek*, 633 F.2d 1, 7 (6th Cir. 1980); *Garrison* v. *Webb Co.*, 583 F.2d 258, 261 (6th Cir. 1978). In a diversity case our Circuit looks to state law in determining whether there was sufficient evidence presented to withstand a motion for judgment notwithstanding the verdict or directed verdict. *Garrison* v. *Webb*, *supra*; *O'Neill* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *Chumbler* v. *McClure*, 505 F.2d 489, 491 (6th Cir. 1974).

Calhoun v. *Honda Motor Co., Ltd., et al.*, No. 82-5512, sl.op. at 5 (6th Cir. June 28, 1984).

In Michigan a motion for directed verdict, or for judgment notwithstanding the verdict, will be denied where the facts, viewed in a light most favorable to the non-moving party, are such that reasonable minds could honestly reach different conclusions. *Bouwman* v. *Chrysler Corporation*, 114 Mich.App. 670 (1982). *See also, Ziginow* v. *Redford Jaycees*, 133 Mich.App. 259 (1983). "When a factual issue is raised, it must be decided by the jury, not a court." *Marietta* v. *Cliffs Ridge, Inc.*, 385 Mich. 364, 372 (1971), quoted in *Foster* v. *Caterpillar Tractor Co.*, 714 F.2d 654, 656 (6th Cir. 1983).

Conversely, a motion for new trial may be granted where the verdict is contrary to the weight of the evidence or the trial court, in the exercise of its discretion, finds such action necessary to prevent a miscarriage of justice. *Trice* v. *Commercial Union Assurance Co.*, 334 F.2d 673 (6th Cir. 1964), *cert. denied* 380 U.S. 915 (1964); *Hartman* v. *White Motor Co.*, 12 F.R.D. 328 (W.D. Mich. 1952).

III.

The plaintiff's motion, insofar as it requests a judgment notwithstanding the verdict, is based upon the contentions that were advanced in support of its motion for a directed verdict. Plaintiff asserts, in substance, that the foreseeability of the accident was conceded by the defendant and that the negligence of the defendant was therefore established.

In Michigan, the test for assessing a manufacturer's liability to persons injured by its product is whether the risk is unreasonable in light of the foreseeable injuries. A defendant has a duty to use reasonable care in designing or manufacturing a product so as to eliminate all risks of injury which are unreasonable and foreseeable. A failure to fulfill that duty is negligence. A defendant has no duty, however, to design or manufacture a product which eliminates a reasonable or unforeseeable risks of injury. *Owens* v. *Allis-Chalmers Corp.*, 414 Mich. 413 (1982).

The Court is convinced that evidence was available in the present case from which the jury could reasonably consider the magnitude of the risk given the conventional design and the utility and safety of using the proposed alternative design. *See, Owens*, 414 Mich. at 429-432; *Foster*, 714 F.2d at 656-657. An issue of fact was therefore created.

Additionally, the Court notes that plaintiff's product liability theory, premised on the tremendous danger of firearms and the great likelihood that such a danger will occur, has been rejected by the vast majority of courts that have considered the issue. *See, Mavilia* v. *Stoeger Industries*, 574 F. Supp. 107 (D. Mass. 1983), and cases cited therein.

IV.

Plaintiff's alternative motion for a new trial is premised on eight alleged trial errors. The burden of showing error at trial warranting a new trial rests, of course, on the party seeking rehearing of the merits. *Call Carl, Inc.* v. *BP Oil Corp.*, 403 F. Supp. 568 (D.C. Md. 1975), *mod on other grds*, 554 F.2d 623 *cert. denied*, 434 U.S. 923 (1977).

Plaintiff first cites as error the Court's *sua sponte* raising of objections to questions posed by plaintiff's counsel. Plaintiff asserts that the conduct of the Court indicated to the jury an opinion as to the ultimate facts.

This argument is without merit. It is well established that a federal trial judge is not only the moderator, but also the governor, of a trial. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931). Such a role "allows the trial judge a good deal of discretion in limiting testimony, requiring attorneys to frame questions properly, and interjecting himself or herself into the trial." *U.S.* v. *Martin, et al.*, Nos. 83-5684 & 83-5688, sl.op. at 12 (6th Cir. June 17, 1984). The Court does not believe that the bounds of discretion were exceeded during the present trial. Moreover, the Court notes that the jurors were specifically instructed that any opinion indicated

by the Court as to the facts was to be disregarded and that no objection was raised by plaintiff's counsel with respect to the adequacy of the instruction.

Second, plaintiff raises as error the Court's granting of defendant's motion in limine prohibiting the use of plaintiff's day-in-the-life film. The Court, after hearing the testimony of Sam Dabish, Jr., his medical doctors, as well as Juana Dabish, and viewing the day-in-the-life film, rendered an extensive bench opinion excluding the film. Briefly, the Court found the film to be unfairly prejudicial and unnecessarily cumulative, pursuant to F.R.E. 403, as well as inadmissible hearsay under F.R.E. 801. Having examined plaintiff's motion and memorandum, the Court does not find any grounds on which to revisit its previous decision.

Third, plaintiff claims error on the part of the Court in refusing to give a jury instruction on the liability of a corporation for the acts of its agents. In support of its proposed instruction plaintiff relies on *People* v. *American Medical Centers, Inc.*, 118 Mich.App. 135 (1982), *cert. denied*, ___U.S.___, 104 S.Ct. 529 (1984).

In *American Medical Centers*, a corporation and several individuals were convicted of Medicaid fraud in Ingham County Circuit Court. The Michigan Court of Appeals affirmed the conviction. The court held, in part, that the trial court's jury instructions, that corporate knowledge depended upon the combined knowledge of its employees and its agents and that a corporation is criminally liable for the acts of its agents and employees undertaken within the scope of their employment, were proper. The court noted that it is "well settled that a corporation is liable for the fraudulent conduct of its president where the conduct was within the scope of his authority." *American Medical Centers*, 118 Mich.App. at 155.

As a review of the case law relied on by plaintiff indicates, the instruction requested by plaintiff, while proper in

the appropriate context, would have been erroneous in the present case. No issue was raised with respect to the liability of the corporation versus its agent or employee. It was undisputed that the corporation, through its president, manufactured and marketed the revolver at issue.

Fourth, plaintiff claims error on the part of the Court in refusing to instruct the jury pursuant to S.J.I.2d 10.07. That instruction states:

> The law recognizes that children act upon childish instincts and impulses. If you find the defendant knew or should have known that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.

The use note on the instruction provides:

> This instruction is to be used in appropriate cases where the plaintiff seeks damages for injury to a minor. If the conduct of a person, e.g., agent, driver, etc., other than defendant was involved in the occurrence, substitute name or other descriptive term in the instruction. This instruction should be given immediately after SJI2d 10.03.
>
> *See Bolser* v. *Davis*, 62 Mich App 731; 233 NW2d 845 (1975), where defendant's knowledge that there were homes along the road on which she was driving was a fact from which a jury could infer that she knew of should have known that a child or children were or were likely to be in the vicinity, and therefore the evidence was sufficient to make this instruction appropriate.

As the use note indicates, the instruction is designed to be utilized in those cases where a defendant or a related party should have been on guard for the presence of a child in the vicinity. Again, the instruction is inapplicable to the facts at issue.

Fifth, plaintiff asserts that the Court erred in refusing to give the following special instruction:

> The manufacturer owes a legal obligation of due care to a bystander affected by the use of the product.
>
> Or, a manufacturer owes the consumer an obligation to avoid negligent conduct. The obligation extends to persons within the foreseeable scope of the risk.

Plaintiff cites *Moning* v. *Akow*, 400 Mich. 425 (1977), and *Piercefield* v. *Remington*, 375 Mich. 85 (1965), in support of the proposed instruction.

In *Moning*, a defendant was the manufacturer of a slingshot marketed to children. The Michigan Supreme Court held that the manufacturer owed a legal obligation to a bystander affected by the use of its product and that the issue of whether a defendant, in violation of that obligation, created an unreasonable risk of harm in marketing slingshots directly to children, was for the jury.

In *Piercefield*, the Supreme Court held that a person injured because of a defective product is not required to show privity of contract in order to recover from a manufacturer on a theory of implied warranty. The Court reasoned that as lack of privity is not a defense, the lower court erred in dismissing plaintiff's breach of implied warranty count because plaintiff, a bystander injured by an exploding shotgun barrel, had no privity of contract with the defendant.

In the present action, plaintiff's proposed "lack of privity" instruction and the standard Michigan instructions on implied warranty and negligent design and/or manufacture were given to the jury. The Court is of the view that these instructions accurately state the law in Michigan relevant to the present factual situation and that the instruction proposed by plaintiff would have unduly confused the jury. The Court further notes that the proposed instruction was not presented to the Court for consideration until the morning of the day the jury was to be charged.

Sixth, plaintiff cites error on the part of the Court in furnishing the jury with the following special instruction proposed by defendant:

> The manufacturer of a revolver is entitled to assume that its product will be put to a normal use, that is one for which the product is intended or appropriate and the defendant is not subject to liability when it is safe for all such uses and the injury to the plaintiff results because it is mishandled or misused in a way which the manufacturer has no reason to expect or is used in some unusual and unforeseeable manner.

Plaintiff does not argue that the instruction is an incorrect statement of the law. Rather, plaintiff asserts that the instruction "gave the jury the impression that a revolver is not designed for children and Charter Arms had no way of knowing that they would come in contact with it. This is absolutely untrue in light of the evidence and contributed to the incorrect verdict." Plaintiff's Brief in support of Motion for Judgment Notwithstanding the Verdict or, in the alternative, Brief in support of Motion for New Trial, at 7.

The Court finds this argument to be without merit. The evidence at trial indicated that the defendant was aware that firearms did fall into the hands of children, but that the weapons were marketed for the personal protection of adult consumers and law enforcement personnel. Moreover, state law forbids the sale of firearms to children. M.C.L.A. 28.422. The Court is convinced that the instruction accurately states the law and applies to the facts at issue. *See, Mavilia*, 574 F. Supp. 107, and cases cited therein.

Seventh, plaintiff asserts that the Court erred in furnishing the jury with S.J.I.2d 25.31, regarding the definition of negligent design and manufacture. Plaintiff argues that defendant admitted it was negligent and that the instruction was therefore inappropriate. Plaintiff's claim of error is premised on the same grounds as its motion for judgment notwithstanding the verdict and for those reasons enunci-

ated by the Court in section III of this Opinion, the claim of error is rejected. Additionally, the Court notes that S.J.I.2d 25.31 was requested by the plaintiff.

Finally, plaintiff claims error in the Court's refusal to grant its motion for mistrial. Prior to publication of the verdict, the Court informed counsel on the record that just before resuming the bench it had been informed that a spouse of one of the jurors was involved in a pending lawsuit. Plaintiff subsequently moved for a mistrial and the motion was denied. At the time the motion was denied, the substance of the verdict was unknown.

The Court, in the exercise of its discretion, does not believe that the above incident in any way denied plaintiff a fair trial. In the absence of exceptional circumstances, a new trial is generally not warranted by the inadvertent failure of a juror to disclose other actions or claims unless the losing party establishes prejudice in the sense that the juror was improperly influenced by the undisclosed action. This is particularly true when the failure to disclose was inadvertent. *Morrison* v. *Ted Wilkerson, Inc.*, 343 F. Supp. 1319 (D.C. Mo. 1971). *See generally, McCoy* v. *Goldston*, 652 F.2d 654 (6th Cir. 1981). Plaintiff has at no time alleged exceptional circumstances or improper influence.

Accordingly, plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is DENIED.

So ordered.

(s) George E. Woods
United States District Judge